81-25 No.

Office-Supreme Court, U.S.
FILED
JUN 25 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1980

ONE 1976 ROLLS ROYCE SILVER SHADOW, SERIAL NO. LRE 25888,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

O. T. WELLS
Attorney for Petitioner
170 Broadway
New York, New York 10038
(212) 349-6699

Hubert Johnson, Esq.
Of Counsel

5179 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the Constitution of the United States supports the issuance of a search warrant for a vehicle, where the only activity described in the supporting affidavit therefor are the alleged criminal activities of the owner, not involving the use of the vehicle.

2. Whether evidence seized from a vehicle pursuant to a defective search warrant can be used in a federal forfeiture proceeding.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

A. Procedural History 3

B. Statement of Facts 4

Reasons for Granting the Writ:

I. The forfeiture of Leroy Butler's vehicle constitutes a violation of the terms of the Fourth Amendment to the United States Constitution and is an unconstitutional taking under the Fifth Amendment. 6

Conclusion 14

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) 7, 11

Boyd v. United States, 116 U.S. 616 9

Chapman v. United States, 365 U.S. 610 (1961) 11

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 14

Mapp v. Ohio, 367 U.S. 643 (1961) 10

One 1958 Plymouth Sedan v. Pennsylvania, 38 U.S. 693 (1965) 9, 10

Spinelli v. United States, 393 U.S. 14, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) 7, 11, 13

Ted's Motors v. United States, 217 F. 2d 777 (8th Cir. 1954) 7

United States v. Cobb, 432 F. 2d 716 (4th Cir. 1970) 11

United States v. Davidson, 50 F. 2d 517 (1st Cir.), cert. den. 284 U.S. 660, 52 S. Ct. 36, 76 L. Ed. 559 (1931) 7

United States v. Marihart, 472 F. 2d 809 (8th Cir. 1972), cert. den. 419 U.S. 827, 95 S. Ct. 46, 42 L. Ed. 2d 52 (1974). 7

Contents

Page

United States v. One 1949 Pontiac Sedan, 194 F. 2d 756 (7th Cir.), cert. den. 343 U.S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363 (1952) 7

United States v. One 1975 Ford F 100 Pick-up Truck, 558 F. 2d 755 (5th Cir. 1977) 7

United States v. One 1972 Chevrolet, Corvette, 23 Crim. Law 2396 (2nd Cir. 1980) 8

United States v. One Twin Engine Beech Airplane, 533 F. 2d 1106 (9th Cir. 1976) 6

United States v. Pappas, 26 Crim. Law 2393 (1980) 11

United States ex rel. Boyance v. Myers, 398 F. 2d 896 (3rd Cir. 1968) 10

Statute Cited:

28 U.S.C. §1254(1) 2

United States Constitution Cited:

Fourth Amendment ..... i, 2, 6, 9, 14

Fifth Amendment 2, 3, 6, 14

APPENDIX

Appendix A — Opinion and Order Dated May 12, 1980.. 1a

Appendix B — Unreported Judgment 37a

Contents

Page

Appendix C — Order Extending Time to File Petition ... 39a

Appendix D — Indictment 40a

Appendix E — Search Warrant for Premises 42a

Appendix F — Search Warrant for Vehicle 44a

Appendix G — Supporting Affidavits for Search Warrants 46a

No.

In The

Supreme Court of the United States

October Term, 1980

ONE 1976 ROLLS ROYCE SILVER SHADOW, SERIAL NO. LRE 25888,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner One 1976 Rolls Royce Silver Shadow, Serial No. LRE 25888, by its owner, Leroy Butler, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 25, 1981.

OPINIONS BELOW

The opinion of the District Court of the District of New Jersey appears as Appendix A to this petition; the unreported judgment of the Court of Appeals affirming the judgment of the District Court appears as Appendix B.

JURISDICTION

The judgment order of the Court of Appeals, affirming the judgment of the District Court, was entered on February 25, 1981. This petition for certiorari was filed within the period, as extended by the Clerk of the United States Supreme Court, as reflected by letter-memorandum, which appears as Appendix C. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Procedural History

On June 13, 1979, at or around 12:30 to 1:30 p.m., Mr. Butler was arrested at his home in Englewood, New Jersey by federal and state enforcement officials. Mr. Butler was first arrested by federal drug enforcement agents pursuant to an indictment arising out of the District Court for the Eastern District of New York, which said indictment appears as Appendix D to this petition. At the same time, Mr. Butler was arrested by New Jersey state law enforcement officials, as a result of a search of his premises and a search of his vehicle, the said searches conducted pursuant to separate search warrants. The search warrant for his premises is annexed hereto as Appendix E; the search warrant for his vehicle is annexed hereto as Appendix F; and the suporting affidavit for both searches is annexed hereto as Appendix G.

Subsequent to the conviction of Mr. Leroy Butler on the aforesaid federal indictment, the United States Attorney for the District of New Jersey filed a complaint seeking forfeiture of the One 1976 Rolls Royce Silver Shadow, Serial No. LRE 25888, on

October 18, 1979. The answer to the complaint was filed on February 11, 1980. A notice of motion for order dismissing complaint and returning property, together with supporting brief, was filed by claimant Leroy Butler on February 11, 1980. A notice of motion for summary judgment to controvert search warrant and for return of property, together with supporting brief was filed in the federal District Court for New Jersey on February 26, 1980 by claimant Leroy Butler. On June 10, 1980, there was entered on the docket in the clerk's office of the United States District Court for the District of New Jersey, an order granting the United States of America judgment for summary judgment and directing forfeiture of the subject vehicle. On June 10, 1980, an order entered staying the order granting summary judgment to the favor of the United States and forfeiture of the subject vehicle pending appeal to the United States Court of Appeals for the Third Circuit. On February 23, 1981, judgment was entered by the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey granting summary judgment to the favor of the United States of America.

B. Statement of Facts

On June 13, 1979, at or around 12:30 to 1:30 p.m., Mr. Butler was seated in his tenant's house playing chess with a female. At that time, Butler noticed a white male standing in the rear of his residence looking out of sliding glass doors. Upon seeing the strange face, Mr. Butler alighted from his seat, at which time approximately eight to ten males ran to his tenant's house with guns drawn.

Upon reaching the tenant's house, one of the males inquired as to whether Butler was Leroy Butler. Having received an affirmative answer, one of the males advised Mr. Butler that he

was under arrest and that he had to return to the main residence, which was located approximately thirty (30) to forty (40) yards from the tenant's house. It was later ascertained that the first male advising Mr. Butler that he was under arrest was a federal agent attached to the Federal Drug Enforcement Administration by the name of Agent Stromfeld. On the way to the main residence, Englewood, New Jersey police officers advised Mr. Butler that they had a search warrant to search his home. Upon arrival at the house, Mr. Butler was told to be seated along with members of the household. The premises were completely secured by federal and local Englewood, New Jersey authorities, permitting no one to move unless escorted by the said officers. At the time that Mr. Butler was instructed to be seated, the authorities, both federal and state, started to execute a search of the premises.

During the search of the premises, federal agents, pursuant to a search warrant for a 1976 Rolls Royce, Silver Shadow, Sedan, Serial No. LRE 25888, searched the said vehicle, which was parked in the garage annexed to the private premises of Mr. Butler.

The presence and authority of the federal agents to be on Mr. Butler's premises arose out of a federal indictment with jurisdiction in the Eastern District of New York, charging a violation of 21 U.S.C. §§846 and 848, as reflected by Indictment No. 78 Cr. 752.

The search of Mr. Butler's premises and the search of Mr. Butler's vehicle was executed pursuant to independent search warrants issued by the local Muncipal Court of Englewood, New Jersey, which said search warrants were premised on one affidavit as previously identified and annexed to this petition.

Pursuant to the search warrant for the vehicle, Lieutenant Salvatore Marino, Englewood Police Department, searched Mr.

Butler's vehicle, assisted by Federal Agent Stromfeld, and allegedly found an envelope bearing Butler's name and address concealed in a pocket on the rear of one of the front seats of the automobile. It is alleged, by the United States government, that the discovery of the small quantity of cocaine, in an envelope concealed in a pocket on the rear of one of the front seats of the automobile, caused Special Agent Stromfeld to seize the vehicle.

The search warrant for the vehicle was premised upon the supporting affidavit, as annexed hereto, which said affidavit describes the vehicle as a One 1976 Rolls Royce Silver Shadow and indicates that Mr. Leroy Butler, 471 Llewelyn Circle, Englewood, New Jersey, is the registered owner. The affidavit does not associate or identify the vehicle with any criminal activities of Mr. Butler or any of his alleged associates.

REASONS FOR GRANTING THE WRIT

I.

THE FORFEITURE OF LEROY BUTLER'S VEHICLE CONSTITUTES A VIOLATION OF THE TERMS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IS AN UNCONSTITUTIONAL TAKING UNDER THE FIFTH AMENDMENT.

Our analysis begins with the basic proposition that the government, by way of the affidavit in support of the search warrant for the vehicle, made no showing whatsoever of any probable cause to believe that the vehicle was used in any drug-related activities. Further, it should be noted that "probable cause" in a forfeiture proceeding is not a special term or art, but is the same standard employed to test searches and seizures generally. *See United States v. One Twin Engine Beech Airplane,* 533 F. 2d 1106, 1107-1109 (9th Cir. 1976). Moreover,

the government, in order to be successful in a forfeiture proceeding, must show probable cause, together with the establishment of a prima facie case. *See Ted's Motors v. United States*, 217 F. 2d 777 (8th Cir. 1954); *United States v. One 1949 Pontiac Sedan*, 194 F. 2d 756, 758-59 (7th Cir.), *cert. den.* 343 U.S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363 (1952); *United States v. Davidson*, 50 F. 2d 517, 520-21 (1st Cir.), *cert. den.* 284 U.S. 660, 52 S. Ct. 36, 76 L. Ed. 559 (1931).

In the instant case, Leroy Butler has consistently demonstrated that facts, constituting probable cause, did not actually exist at the time the search warrant issued for the search of the vehicle, nor at the time the actual search occurred. In that respect, the government was not entitled to the benefits of a summary judgment. *See United States v. One 1975 Ford F 100 Pick-up Truck*, 558 F. 2d 755, 756-57 (5th Cir. 1977).

More important is the fact that the affidavit for the search warrant of the vehicle was defective on its face and also inadequate for purposes of meeting the two-pronged *Aguilar* test. *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *see also, Spinelli v. United States*, 393 U.S. 14, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The affidavit in question does not even make a bare assertion that the subject vehicle was probably involved in any criminal activities. In that respect, an affidavit for a search warrant may be adequate if it is either sufficiently detailed or sufficiently corroborated as to supply as much trustworthiness as does the two-pronged *Aguilar* test. *See United States v. Marihart*, 472 F. 2d 809, 812-15 (8th Cir. 1972), *cert. den.* 419 U.S. 827, 95 S. Ct. 46, 42 L. Ed. 2d 52 (1974). In the present case, there is no information set forth in the affidavit in support of the search warrant for the subject vehicle, revealing either

personal knowledge of certain facts and events nor hearsay of certain facts and events, which would lead one to believe that the subject vehicle was probably involved in criminal activities.

The more difficult problem relates to the ground upon which the District Court upheld the search of the vehicle and granted the forfeiture of the same. The same difficulty arises as to the grounds on which the Court of Appeals affirmed the judgment of the federal District Court for the District of New Jersey. Nowhere in the affidavit itself is there any connection of alleged criminal activities of the owner with the vehicle in question. It is, therefore, to be noted that the federal District Court upheld the search of the vehicle on the validity and adequacy of the search warrant, which said search warrant was premised upon, obviously, a defective affidavit. In that respect, the Second Circuit has stated in relevant part:

> "Whether there is a sufficient nexus between the use of the vehicle and the illegal transaction, is consonant with Congress' statement that it is the intent of these provisions that property would be forfeited only if there is substantial connection between the property and the underlying criminal activity . . . we find no decision upholding forfeiture on the basis of the facilitation clause in which there was not an antecedent relationship between the vehicle and the sale of narcotics."

See United States v. One 1972 Chevrolet, Corvette, 23 Crim. Law 2396, 2397 (2nd Cir. 1980).

Equally significant to this petition is the fact that the government has neither denied nor controverted the following facts:

1. The attorneys for Leroy Butler had no knowledge of the existence of the search warrant directed at the above vehicle prior to the institution of the forfeiture proceeding;

2. Not one single fact is set forth in the underlying affidavit which even remotely suggests that the subject vehicle was involved in any drug-related acitvity;

3. The identity of the owner and the description of the automobile are the only facts set forth in the underlying affidavit which relate to the subject vehicle; and

4. There has not been any testimony during any proceeding or any papers filed during any proceedings which describe or reflect the Rolls Royce in transition or which show or reflect that Mr. Butler was ever the driver of the Rolls Royce on, near or about June 13, 1979.

Furthermore, the United States Supreme Court has stated that the "exclusionary rule does apply" to forfeiture proceedings. *See One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 696 (1965), *citing Boyd v. United States,* 116 U.S. 616, for the proposition that the results of a search of a vehicle which violates the Fourth Amendment may not be relied upon to sustain a forfeiture. Thus, the Court stated in relevant part:

> "The authoritative statement and the holding by the Court in *Boyd* that the government could not seize evidence in violation of the Fourth Amendment for use in a forfeiture proceeding would seem dispositive of this case. In both *Boyd's* situation and here, the essential question is whether evidence . . . in *Boyd,* the books and records, here the results of the search of the

> car . . . the obtaining of which violates the Fourth Amendment may not be relied upon to sustain a forfeiture. *Boyd* holds that it may not."

See One Plymouth Sedan v. Pennsylvania, supra, 380 U.S. at 698.

In *Plymouth Sedan v. Pennsylvania, supra,* contraband liquor seized in an unconstitutional search of an automobile had been used as evidence to sustain the seizing of the automobile pursuant to the forfeiture-laws. The state court had held that exclusionary rules in *Mapp v. Ohio,* 367 U.S. 643, 657 (1961) did not apply. The United States Supreme Court held to the contrary and further held that a forfeiture proceeding is criminal, not civil, hence plainly subject to the Fourth Amendment. In so holding, the Court stated:

> "There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which the particular automobile was put that subjects Mr. McConigle to its possible loss . . ."

See One 1958 Plymouth Sedan, supra, 380 U.S. at 699.

The instant search and seizure of Mr. Butler's automobile is governed by this Court's opinion in *United States, ex rel. Boyance v. Myers,* 398 F. 2d 896 (3rd Cir. 1968). In that particular case, Boyance's home was searched pursuant to a search warrant, but a codefendant's automobile was searched without a warrant, while it was parked in Boyance's driveway. In addition to the items seized in the search of the house itself, two iron bars, identified as being used to break into various burglarized buildings, were found in the search of the car belonging to Roberts. The car was parked in Boyance's

driveway. The District Court found that these were seized in a later search after Roberts, who had been discovered and arrested in the first search and was then in custody, gave his consent to the search of the car. The Third Circuit invalidated the search of the car on the basis that:

> "Such consent could not validate the search so far as Boyance was concerned, where his consent had not been obtained and the car was within the curtilage of his home." *Citing Chapman v. United States,* 365 U.S. 610 (1961).

In this case, Mr. Butler's vehicle stands on the same footing, in that the underlying affidavit for the search warrant merely established presence of the automobile at Mr. Butler's home and the identity of the owner. In that respect, the United States Supreme Court has never sanctioned the issuance of a search warrant on less than probable cause in the context of a criminal or quasi-criminal proceeding. *See United States v. Pappas,* 26 Crim. Law 2393 (1980).

Reliance may also be placed upon *United States v. Cobb,* 432 F. 2d 716 (4th Cir. 1970), where the court held that the warrant to search the automobile was insufficient to meet requirements of federal Supreme Court decisions, where the only facts alleged were that the defendant had a long record of making and transporting non-tax paid liquor; and that, based on information from reliable sources wishing to remain confidential, the defendant used his vehicle from time to time to transport non-tax paid liquor. There, the government did not contest the fact that the affidavit could not support the issuance of a search warrant under the test of *Aguilar v. Texas, supra,* and *Spinelli v. United States, supra.* The court held that the affidavit was plainly insufficient under the rules stated in *Spinelli, supra.*

It is significant that the court below relied upon the proposition that:

> "Probable cause for forfeiture exists if there is evidence sufficient to warrant a prudent person to believe that the subject vehicle was used in violation of the above quoted forfeiture statutes. The requisite evidence is less than prima facie proof, but more than mere suspicion." (Citations omitted.)

Equally significant is the basis on which the lower court upheld the search of the vehicle in question. The court, in reaching its conclusion, stated in relevant part:

> "I have reviewed the affidavit propounded by Engelwood Detective Crowley in support of both of the search warrants; I conclude that this affidavit established the requisite cause to search the 1976 Rolls Royce. In reaching this conclusion, I expressly rely upon the well-reasoned memorandum opinion and order of Chief Judge Mishler in United States v. Leroy Butler, et al., No. 78 Cr. 752 (EDNY), September 20, 1979, which I attach hereto as an appendix to this bench opinion. In addition I note that the following portions of the search warrant affidavit when taken together with the remaining allegations, clearly establish probable cause to search the Rolls Royce (as opposed to claimant's residence).
>
> Crowley's informant stated that he personally observed a trapdoor in the ceiling of Butler's garage where Butler would keep his drug and

> dilutants (sic) (Search Warrant Affidavit of James Crowley, page 5). Moreover, the affiant states that Mrs. Butler told other Englewood Police Officers on April 16, 1979 'that Leroy does not live at the house, just comes there everyday to conduct his business.' Id. at page 8. I find that these two facts, when taken together with other facts related in Det. Crowley's affidavit suffice to establish the existence of the requisite probable cause to search claimant's Rolls Royce."

The obvious shortcoming of the above opinion is that although this court rules upon the integrity and validity of the search warrant for the vehicle, the court expressly relies upon Chief Judge Mishler's opinion wherein he does not rule upon the search warrant for the vehicle. All other factors set forth in the affidavit, whether reliable or not, relate to alleged activities of Leroy Butler and alleged activities occurring in or about his premises. In that respect, the United States Supreme Court has said:

> "In the absence of a statement detailing the manner in which the information is gathered, it is especially important that the tip describe the accused criminal acitivity in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

See Spinelli v. United States, 393 U.S. 410, 416 (1969).

In the instant case, the affidavit in no way ties any of the alleged criminal activities or alleged conduct by Butler or

anybody on his premises with the vehicle in question. Thus, the affidavit in support of the search warrant for the vehicle condemns itself. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). It is, therefore, clear that the magistrate had no information whatsoever to issue a search warrant for Mr. Butler's vehicle.

Mr. Butler asks this Court to grant a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit on the fundamental constitutional question of whether the Fourth Amendment to the Constitution of the United States of America supports the issuances of a search warrant for a vehicle, where the only activity described in the supporting affidavit therefore are the alleged activities of the owner, not involving the use of the vehicle. Another serious constitutional issue is whether a forfeiture, pursuant to a search of a vehicle under a defective warrant, would constitute an unconstitutional taking in violation of the Fifth Amendment to the United States Constitution.

CONCLUSION

For all the reasons stated above, Mr. Butler respectfully requests that his application for a writ of certiorari be granted in this case.

Respectfully submitted,

HUBERT JOHNSON
Attorney for Petitioner

APPENDIX A — OPINION AND ORDER DATED MAY 12, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 79-3051

UNITED STATES OF AMERICA,

v.

ONE 1976 ROLLS ROYCE SILVER SHADOW,

Defendant.

TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTION

Newark, New Jersey
May 12, 1980

BEFORE:
THE HONORABLE JAMES A. COOLAHAN, U.S.D.J.

Appearances:
ROBERT J. DEL TUFO, UNITED STATES ATTORNEY
By: STEPHEN MILLS, ASSISTANT UNITED STATES ATTORNEY
For the Government

HUBERT JOHNSON, ESQ.
O.T. WELLS, ESQ. (New York)
Attorneys for Defendant

Appendix A

[2] THE COURT: United States of America vs. One 1976 Rolls Royce.

MR. MILLS: Good morning, your Honor. Stephen Mills, Assistant United States Attorney for the Government.

This is an application by the United States for summary judgment in a forfeiture action. Basically the facts, as I might summarize them, and stated in the brief I filed on behalf of the United States are that on June 13th, 1979 an individual named Leroy Butler was arrested in Englewood, New Jersey pursuant to a bench warrant issued by Chief Judge Mishler in the Eastern District of New York on a narcotics related indictment.

At the time of Mr. Butler's arrest at his residence, the Englewood Police Department had in their possession search warrants for both his home and his vehicle. Both search warrants were executed with the assistance of Federal agents and the New York City police.

With reference to the automobile which is all we are concerned with, the automobile, the Rolls Royce, was searched and concealed in the pocket of the rear of one of the front seats was an envelope containing about nine, nine and a half grams of cocaine.

The facts that we are relying on the summary judgment motion are set out in the affidavits of Special Agent Stromfeld of the Drug Enforcement Administration [3] relating to the execution of the search warrant, and the affidavit of Lieutenant Marino of the Englewood Police Department, also relating to the search warrant.

Appendix A

The search warrant was issued by a Municipal Court judge in Englewood, New Jersey, and the approximately nine grams of cocaine found in the Rolls Royce are listed on the return.

In the Eastern District of New York during the criminal proceeding against Mr. Butler and others, a motion to suppress evidence, general motion to suppress evidence was filed by counsel for Mr. Butler, who is also appearing in this matter.

There was a hearing and Chief Judge Mishler wrote a memorandum which is exhibit I to our brief denying the motion to suppress.

Those basically are the facts, your Honor.

Essentially, our position is, first, that the affidavits that we have submitted which are uncontradicted provided the showing needed for the Court to grant a summary judgment. I don't believe that there is any dispute in the case that a search warrant was obtained, that a search warrant was executed and that a quantity of cocaine was found in the vehicle, and I think that as the case is and the statutory citations in our brief point out, your Honor, this is all we have to prove in order for the Court to order forfeiture.

[4] I believe that the one issue in the case has to do with the probable cause of the warrant, and it's our position, alternatively, that the defendants in this case are estopped, collaterally estopped from relitigating the issues that we have already litigated in front of Judge Mishler, and in the alternative, your Honor, that the Court should, in fact, adopt Judge Mishler's opinion ruling that there was probably cause for the search.

Appendix A

The cases we have cited essentially point out as far as collateral estoppel that a proceeding such as the one that counsel for Mr. Butler were involved in in the Eastern District of New York, namely a motion to suppress with a hearing with an opinion written by Judge Mishler is the type of proceeding to which collateral estoppel applies.

A motion to suppress was made, a hearing was held, and witnesses testified and Judge Mishler in his opinion referred to the search of both the house and the vehicle.

I think that the only question here which has been raised by Mr. Johnson is that apparently counsel representing Mr. Butler, or presumably the other defendants, were not aware until rather recently of the fact that there were two search warrants issued from one affidavit as opposed to one search warrant.

It's our position that that particular issue is irrelevant because, number one, both search warrants were [5] issued based on the same affidavit, the affidavit of Detective Crowley of the Englewood Police Department.

Number two, that the motion related to all evidence, it was not related to the house or to the car, but to everything.

Number three, counsel for defendant, Butler, knew that a quantity of cocaine was seized in the vehicle, whether or not the Government intended to use it at trial.

And, number four, if Chief Judge Mishler ruled, and it says in the opinion "house and car" if Chief Judge Mishler ruled that it was all right to search the car without a warrant, I think it's quite clear that Chief Judge Mishler would have ruled that it would have been all right to search it with a warrant.

It's our position that this is a classic case for collateral estoppel because it was obvious to counsel representing Mr. Butler that contraband had been seized which might be the subject, at least of a civil application as far as the vehicle, if not a criminal prosecution in either State or Federal Court, and I think that since they knew that this contraband had been seized when they filed their motions, and since they went through a hearing and Chief Judge Mishler decided all of those issues, they should be collaterally estopped from relitigating the identical issues with no facts added, with nothing added in this Court.

[6] Alternatively, your Honor, we are not at all suggesting that we are uncomfortable with the opinion written by Judge Mishler and, alternatively, we would ask the Court to adopt it and rule that there was probable cause for the search of the vehicle.

Thank you.

THE COURT: All right.

MR. JOHNSON: Yes, your Honor, good morning, your Honor. Hubert Johnson appearing on behalf of claimant, Leroy Butler.

May it please the Court to have O.T. Wells present, who is sitting at counsel table, a member of the New York Bar.

Your Honor, from the outset I would point out that we are not conceding that Mr. Butler knew that drugs were in that car. We are not even conceding that drugs were, in fact, in the car.

As a matter of fact, his claim for ownership indicates by way of affidavit that he did not know that drugs were in his car.

Furthermore, his answers to the Government's complaint also pleads that he did not know that drugs were in his car and that he did not even use that car on June 14th, June 13th or any time for the facilitation of the transportation of drugs.

[7]Also, I might indicate that Mr. Wells and I were at counsel for Mr. Butler in the matter in the New York District Court for the Eastern District.

That matter started at trial on or about September 17th, 1979. It concluded mid October, 1979.

I point that out, your Honor, to point out further that at no time, at no time prior to the sentencing of Mr. Butler did we have any knowledge that the search warrant for Mr. Butler's car even existed.

At no time did we have any knowledge of that fact until such time as the United States Attorney here advised me.

As a matter of fact, I filed, once I answered the complaint here, I filed a motion to dismiss based on the fact that it was a warrantless search of his vehicle.

I then received a call from Mr. Mills, who indicated to me that there was a warrant for the vehicle.

I indicated further that I didn't believe it, not because I didn't believe him, but it's just impossible for that warrant not to have been turned over.

At any rate, it was not turned over and I think I filed thereafter a motion for summary judgment, which is before the

Court today, and I included the approximately 164 pages of exhibits there indicating from the beginning of Sergeant Crowley's incident report dated June 13th, 1979, [8] running through and including the disposition of the case in New York.

At no time did the Government who had an affirmative obligation turn over the search warrant for the vehicle in question.

So the question about this, your Honor, the question becomes whether or not I am collaterally estopped from proceeding on the validity of that search warrant for the car in face of the fact that the United States Government had an affirmative obligation pursuant to the criminal rules of procedure to turn over that affidavit, that search warrant.

I might also point out that it's clear to me, and I'm sure it's clear to this Court, that if the United States Government had turned that document over timely we wouldn't be here today.

I might also point out that although I have raised the issue as to whether or not the search warrant would be effective on its face, the Government has not responded to that.

Surely enough, as your Honor knows, the Government cannot in good candor respond to that argument.

So the question becomes this: May the Government take advantage of the United States Government's first refusal an arrogant refusal to turn over documents that Mr. Butler had a right to receive in the case in chief that was [9] then pending in the Eastern District before Judge Mishler.

Appendix A

Now, the Government wants to take advantage of that refusal to turn over the document, if it ever existed. Now the Government wants to take advantage of our inability at that time to launch the necessary attacks against that document.

Surely the Government says it was a general motion to suppress. Surely enough, it was general. It would have been specific, it would have been aimed, it would have been sharp, it would have went right to the heart of the affidavit on the opinion of the search warrant for the vehicle if the Government had followed its responsibility under the Federal rules of procedure and turned it over.

Now, the Government wants you to reward the United States Government for its failure to abide by the Federal rules of procedure. The only reason why the Government wants you to do that, and then wants Judge Mishler's decision as collaterally binding in estopping on the claimant in this matter — I point out to you, that Judge Mishler couldn't have possibly ruled upon the search of the vehicle. He could not have possibly ruled upon the legitimacy of the search warrant issued in the first place because it was never before him. He had no knowledge of it.

I might also point out that Judge Mishler uses the word "search warrant" three times in his written opinion. [10] He never refers to search warrants with the plural. I am not arguing over an "s".

I know a Chief Presiding Judge is astute enough to say precisely what he means in a well reasoned written opinion. Although I might not agree with it, I do know there is reason on his behalf and I wouldn't have the arrogance to say today that

Appendix A

Judge Mishler ruled upon two search warrants and never used the word with an "s". He never used the phrase "search warrants" for the vehicle in question.

Surely enough the Government concedes that the alleged cocaine was concealed in an envelope which was then placed in the pouch on the rear front seat of the vehicle, and I briefed this Court in great detail that if the Government is going to rely upon that evidence, then the Government must rely upon that evidence having been legally seized.

Surely that's the teaching of Elkins v. United States. That the teaching of the civil collateral doctrine, but the Government wants to rely upon Judge Mishler's decision for all the reasons I have given your Honor.

It's clear to me that this Court cannot say conclusively that Judge Mishler intended to rule upon the search of that vehicle, which was searched pursuant to the Government's affidavit under the search warrant for the vehicle. It's precisely stated in Stromfeld's affidavit, which the Government relies upon, also in Salvatore Marino's [11] affidavit, which the Government relies upon, that they seized the drugs in question pursuant to the search warrant for the vehicle. The same search warrant that Mr. Butler's counsel never had the opportunity before this honorable Court gave us the opportunity to contest the validity of that search warrant.

The papers are before your Honor and I might point out for your consideration that the only mention of the Rolls Royce and the affidavit under the alleged search warrant for the vehicle is the description of One Rolls Royce and some statement to the effect that it belongs to Leroy Butler.

Appendix A

Surely we concede the description. Surely we concede that it belongs to him. However, there is nothing else left in that affidavit that pertains to that Rolls Royce in question. There is no mentioning of it being seen on June 13th, 1979. There is no mentioning of Mr. Butler ever driving that Rolls Royce or having been seen driving that Rolls Royce in truth and in fact.

Thus, the search warrant for the vehicle is defective on its face without any further argument.

However, I would also point out to your Honor that in terms of being collaterally estopped there have been decisions decided by the Supreme Court that even if counsel say, for example, would have failed to make a motion to suppress, there have been decisions deciding the issue of whether or not [12] the defendant could not complain on appeal that his counsel did not make a motion to suppress and he has been harmed by the failure of counsel to make that motion.

And surely there have been cases to indicate further than even if counsel had by way of inexperience, inadvertence, had failed to make a motion, there would have been a substantial motion, then the Court would reverse and remand for a hearing.

I only point that out to say that it was not through inadvertence, it was not through negligence, it was not through a lack of due diligence that Mr. Butler's attorney was not successful in New York on the motion to suppress the evidence seized from the vehicle or to controvert the search warrant, because as I stated, we never knew it until Mr. Mills advised us, and that was after Mr. Butler was convicted and after he was sentenced.

Appendix A

Thus, in this particular case, unlike cases that have been reversed because the motion to suppress would have been reversed had counsel been on the right ground, had he moved the timely move, the information was withheld from us.

And to award the Government at this time for withholding of that evidence is a bit too much.

I would ask that your Honor grant —

THE COURT: When was Mr. Butler tried in [13] Brooklyn?

MR. JOHNSON: Beginning on September 17th, 1979 and convicted mid October, 1979.

THE COURT: You knew that this seize was made on June 13th, 1979?

MR. JOHNSON: That's correct, your Honor.

THE COURT: You were aware that the automobile had been seized?

MR. JOHNSON: We were aware that it had been seized, that's correct.

I might also point out as part of my client's — and I need not go to them now because your Honor has the exhibits — we would move for a bill of particulars and we also moved in the bill of particulars that should the bill of particulars or any matter thereafter call us to have to make additional motions, we reserve the right to make those additional motions.

After we had moved for a bill of particulars, after I had asked the State Prosecutor to turn over all discoverable matters, the County Prosecutor did not turn over that search warrant and the United States Attorney, although we had the bill of particulars, did not turn over the search warrant.

In truth, in fact, it was never mentioned during the course of the proceedings in our papers or in the United [14] States Attorney's papers, and if we had that search warrant in the beginning, Judge, it's clear to your Honor that we would not be here today because the search warrant is defective on its face.

THE COURT: In what respect do you say it's defective?

MR. JOHNSON: First of all, issued on the affidavit of Sergeant Crowley, who at no time in the search warrant said any more about the vehicle than described the vehicle in question.

It was on the basis of the description of the vehicle, nothing more, that the search warrant issued against the vehicle.

THE COURT: Yes.

MR. JOHNSON: Clearly that's insufficient as a matter of law. There is nothing criminal about owning a Rolls Royce. I don't day that facetiously, Judge, but that's all in the affidavit.

THE COURT: You and I must agree there are not too many of those around.

MR. JOHNSON: That's correct, Judge. That's why I said I didn't say it facetiously, because it's not criminal to own a Rolls Royce, and that's the only information that was set forth in the affidavit on the pending of the issuance of the search warrant.

[15] Your Honor, may co-counsel, Mr. Wells, address the Court?

THE COURT: Surely.

MR. WELLS: May it please the Court, my name is Ozro Thaddeus Wells, I prefer O.T. Wells. I represented Mr. Butler in the District Court at the trial, and also I was the attorney who handled the motion to suppress and controvert the warrant issued for his premises.

I'd like to just make certain representations to the Court so you could have a full picture as to what developed and what happened with regard to the search warrant.

At no time through the 3500 material, as we describe it, or discovery material offered by the Assistant United States Attorney, Mr. Barry Schulman, was there ever any mention made that there was, in fact, a second search warrant for a vehicle, in particular, the Rolls Royce.

As a point of fact, I have in my possession now a letter dated August 30th, 1979 where he embodies certain agreements or certain understandings when as co-counsel had for other defendants where he makes mention of the search warrant.

He makes mention only of one search warrant. This is for 471 Lewelen Circle, which is the premises.

At no time is there ever any mention that there is a search warrant that included an automobile of any sort, [16] particularly the Rolls Royce. There was never any information presented to counsel or to any other parties involved that the Rolls Royce itself was the subject of a second search warrant.

Appendix A

Also, it would appear that Mr. Mills' agrument presented to this Court included in the event that there wasn't a search warrant that Judge Mishler's decision extended itself to include the authority of the search warrant for the home to include within its authority the car itself.

Well, your Honor, there was never any evidence or anything presented to the District Court at that time that involved any seizure from the car. There was never any litigation as far as the contraband or alleged contraband seized from the car. There was never any evidence presented that could contest that seizure.

As a matter of fact, opposition has been and is that there was never any contraband within that car. There was never any contraband seized from that car, but the attractiveness of its presence we think precipitated the action that they took and we are ready to proceed and litigate that issue.

Furthermore, your Honor, it appears that even when you consider the return from the search warrant, that the return from the search warrant signed by the officer over the signature of the magistrate issuing the search [17] warrant, the authority is the local Englewood authority, significantly, it covers I think twelve to fourteen items and there is a signature of the officer.

Then attached to the second sheet where the officer's name does not appear, where the magistrate's name does not appear to acknowledge receipt of that, are the articles that were allegedly seized from the car, which appears to be from even looking at the return some afterthought, some after the fact addition or movement related to the search itself.

What we are saying, your Honor, I'm going to say it in short — I am longer than I intended to be —

THE COURT: Go Ahead.

MR. WELLS: Our intention is if there had never been any litigation or any evidentiary proof presently regarding the seizure of the car or the seizure in the house as well as for other evidentiary hearings we had, there was testimony offered by the defendants, by the defendant himself in certain instances relating to seizures and relating to statements made, allegedly made by him. There was never any litigation of the car at all.

What we had done administratively, we had moved for the return of the car. We were the claimants. We had filed within the statutory period of time the petition demanding return of the car to Mr. Leroy Butler setting forth the [18] necessary prerequisites, the ownership, and that it was not used in any illegal activity.

Administratively that had been exhausted.

The Government moved on this case against the Rolls Royce. At some time it moved for a forfeiture without even notifying us that they had moved civilly against the car, and only after communicating with Mr. Mills' office in good faith they recognized that error had been committed and then informed us that they had, in fact, made the error, they had, in fact, proceeded against the car without notice to us and received notice, then all time elements were then waived that we were permitted to answer their claim or petition.

What we are saying is that from the very beginning there hasn't been what you would call — Mr. Johnson described it as "bad faith".

Appendix A

I will say this much, there wasn't a proper response to inquiries, there wasn't a proper response to demand being made pursuant to our authority for discovery in 3500 material. Never any reference made in any response to our conversations that there was, in fact, a search warrant addressing itself to the automobile.

There is never at any time any response made or any attempt offered to us for us to present to the Court or any Court a proper litigation of the issue as to whether or not there was any contraband in that car, the Rolls Royce, or [19] whether or not the Rolls Royce had ever been used for purpose of trafficking in narcotics or any illegal activity.

That had not been resolved at all. Judge Mishler did not decide it. We did not present it to any court.

It's our contention that that issue must be presented above all, whether or not the car was, in fact, involved in any illegal activity and whether or not there was any contraband found in the car. We do not concede that.

Mr. Johnson indicated we do not admit there was contraband found in the car.

Added to that, we have administratively moved to return the car. We knew, of course, that it was seized. We know that he had lost his car. Of course, we did, but we were also of the impression the seizure was based upon their action on that date when they came and seized a lot of other matters, some contraband and some not.

There were rifles that were seized, there were spoons, there were other paraphernalia that were seized that was not on their face contraband. The Rolls Royce was seized, too.

We immediately moved or petitioned the return of that Rolls Royce.

Only after some prodding were we informed that there was a warrant for the car or that there was a seizure made that they were claiming had some basis for forfeiting the [20] car of taking the car.

Accordingly, we ask your Honor that our motion be granted, their motion be denied.

MR. MILLS: I'd like to respond rather briefly, your Honor, because I think however eloquent Mr. Johnson and Mr. Wells have been, they have missed the point of this action.

We don't have to prove that the car was used for trafficking. That's in our brief.

We have submitted affidavits on the summary judgment issue placing the contraband in the car. That's all we have to prove.

They have not countered that. They have not disproved that. They have not submitted anything on that issue.

That takes care of the motion for summary judgment.

As far as the other issues, your Honor, they're addressing them in all candor to the wrong Court. If there is a question as to whether or not Mr. Butler's rights may or may not have been

violated in the criminal case in the Eastern District of New York, or whether his rights have been violated in the matter now pending in Bergen County relating from the search of the residence and the vehicle, then Mr. Wells and Mr. Johnson are free to move to suppress in those [21] Courts and to make any other issues.

However, we are dealing here in a civil context and it's clear that they are collaterally estopped on this issue.

Just to point out to the Court, Judge Mishler's opinion said: "Defendant, Leroy Butler, moves pursuant to Rule 41(e) of Criminal Procedure to Suppress as evidence all articles seized at his home located at 431 Lewelen Circle, Engelwood, New Jersey, and his car."

Now, if that doesn't put defense attorneys on notice, I don't know what does, your Honor.

The initial arrest report of Sergeant Crowley, which is CA 1 in the defendant's rebuttal memorandum appendix, on June 12th, 1979 Detective Sergeant Crowley obtained a search warrant for the home of Leroy Butler, 471 Lewelen Circle, Englewood, New Jersey, and his car, a 1976 Rolls Royce, et cetera, et cetera.

I certainly found out about the search warrant, your Honor, when I read that report, and I read that and I called up Sergeant Crowley and I found out there were two search warrants.

Apparently what happened here, your Honor, was that since Mr. Butler was being tried in Brooklyn on a heroin conspiracy, I think probably what happened is the United States Attorney's office in Brooklyn was not going to utilize the [22]

small quantity of cocaine in the car as evidence on the heroin case, it might not have even been admissible. They probably made no further inquiry.

The whole thing is inadvertent to begin with, but it's irrelevant. If Mr. Butler believes that his rights were violated as a defendant in the Eastern District of New York, or that there has been some nondisclosure in the Eastern District of New York or Bergen County, he can make motions.

But we have satisfied our burden on the civil action and they haven't. So they are —

THE COURT: They are two different cases.

MR. MILLS: That's correct, your Honor.

MR. JOHNSON: Your Honor, if I may just briefly respond. They are two different cases, that's entirely correct.

However, what Mr. Mills does not understand is that although a forfeiture proceeding has some trappings of a civil proceeding, it is indeed and in fact a criminal proceeding for purposes of the Fourth Amendment in search and seizure.

What he does not also understand is that he seeks to use the very evidence that was seized. If he intends to use the evidence that was seized from Mr. Butler and from a spot that he had a reasonable expectation of privacy, then [23] the United States Attorney must show that that evidence was legally seized, and that's the point of the motion for summary judgment.

He has not shown that that evidence was legally seized that he intends to rely upon, and that's the teaching of the civil collateral doctrine.

He cannot take illegal evidence and proceed to take away constitutional rights or, for that matter, property from somebody and use illegally seized evidence.

I would merely point out to the Court that that's exactly what he is saying. He said in his brief it does not matter.

It makes all the difference in the world, Judge. I briefed this Court on the applicability of the Fourth Amendment to the forfeiture proceeding. I have briefed this Court upon Federal participation how if the Government is going to participate, then the Government must participate according to the Federal Rules of Evidence, and if the Government is going to rely upon items seized from that vehicle, the Government must show those items were legally seized.

The Government does not wish to do that. They rely upon Judge Mishler's decision that had nothing to do with the seizure of items from the vehicle.

Other than that, your Honor, I would submit it [24] to the Court.

THE COURT: Where is Crowley's affidavit? Do we have that?

MR. MILLS: Your Honor, there isn't an affidavit. There is an affidavit from a Lieutenant Marino who was the individual —

Appendix A

THE CLERK: The search warrant affidavit?

MR. MILLS: It's attached to the brief.

THE CLERK: Do you have a copy of it, counsel?

(The document is handed to the Court.)

(There is a pause in the proceedings.)

THE COURT: Gentlemen, I have just reviewed this search warrant again and there is something I want to make sure of and I am of the opinion that the motion made by the defendant or on behalf of the defendant should be denied.

I have found that the warrant for the search of the Rolls Royce was based upon the probable cause necessary and that the search was authorized and lawful.

It has been established that in the search of the Rolls Royce that an envelope bearing the claimant's name and address was concealed in the pocket on the back of the front seat of the car, and that upon making a test of the white powder contained in the envelope, a narcotic drug and controlled substance, to wit, cocaine, was found.

I find that the Government has met its burden [25] of establishing probable cause for the forfeiture, and that the plaintiff has not established any meritorious defenses and, therefore, I conclude that the Government's motion for summary judgment should be granted and that the claimant's motion for dismissal of the complaint for summary judgment should be denied.

MR. MILLS: We will submit an order, your Honor.

THE COURT: Prepare an order to that effect.

MR. JOHNSON: Your Honor, if I may be briefly heard so that the record may be perfected on your finding of fact in reference to the finding of the drugs in question, I might indicate that I indicated and Mr. Wells indicated that we are not conceding the drugs were, in fact, found.

I indicated further that Mr. Butler's claim of ownership in fact and in truth denied that drugs were found in his automobile. He also denied that by way of an answer to the complaint, also.

And I know your Honor has found, but I do want to perfect the record insofar as having made those statements.

Secondly, I would move this Court to stay your Honor's decision pending the filing of an appeal and review.

THE COURT: Yes, I will give you a full opinion on it so you can contact the Reporter and get the full opinion on it.

MR. JOHNSON: Very well. Thank you kindly.

[26] THE COURT: Do you want this sent to you, my full opinion?

MR. JOHNSON: Yes, please.

MR. MILLS: Thank you.

(Following the conclusion of the hearing the Court dictated the following Bench Opinion.)

Appendix A

BENCH OPINION

Presently before the Court in this forfeiture action are the Government's motion for summary judgment and the claimant Butler's motion for dismissal of the complaint, or, in the alternative, for summary judgment. The facts pertinent to these motions follow.

On June 13, 1979, Special Agent Stromfeld of the Drug Enforcement Agency of the United States Department of Justice (DEA) arrested claimant Leroy Butler at Butler's residence in Englewood, New Jersey, pursuant to an arrest warrant issued by the United States District Court for the Eastern District of New York. Pl. Ex. A, Stromfeld Aff., pp. 1, 2. Agent Stromfeld was accompanied by several other DEA Special Agents, as well as officers of the Englewood Police Department and the New York City Police Department. In addition, the Englewood Police Department on June 12, 1979 obtained search warrants for Controlled Substances directed at Butler's residence and his Rolls Royce from the Honorable Joseph M. Clark, Judge, Englewood Municipal Court. These two search [27] warrants were founded entirely upon the search warrant affidavit of Englewood Police Detective Crowley. Pl. Ex. E.

The Government's affiants aver that the arrest and search warrants were executed on June 13, 1979. Lieutenant Marino of the Englewood Police Department searched the defendant Rolls Royce which was found in the garage annexed to Butler's house. DEA Special Agent Stromfeld assisted Lieutenant Marino in the search of the Rolls Royce. Pl. Ex. A, Stromfeld Aff., p. 5; Pl. Ex. B, Marino Aff., p. 4. During the course of the search, Marino discovered an envelope bearing Butler's name and

address in a pocket on the seatback of the car's front seats. The envelope contained a white powder substance. A field test conducted by DEA Agent Stromfeld indicated that the powder was cocaine. Pl. Ex. A, Stromfeld Aff., pp. 5, 6; Pl. Ex. B, Marino Aff., pp. 4, 5.

Claimant Butler was arrested and taken into Federal custody. DEA Special Agent Stromfeld seized the defendant Rolls Royce on the authority of the above-cited forfeiture statutes. Butler was charged by a grand jury in the Eastern District of New York with violating 21 U.S.C. SS 846, 848, 78 Cr. 752 (Mishler, C.J.). Prior to trial, Butler filed a motion to suppress "all evidence seized at the time of (his) arrest. . . ." Pl. Ex. H. By Memorandum Opinion and Order dated September 20, 1979, Chief Judge Mishler denied Butler's suppression motion. Pl. Ex. I (reproduced in the Appendix to [28] this Bench Opinion). Butler's motion challenged the sufficiency of Detective Crowley's affidavit in support of the search warrants of June 12, 1979. Judge Mishler's well-reasoned Opinion reviewed this affidavit and concluded that there existed the requisite probable cause to issue "a" warrant for the search of defendant's residence and car. *Id.* at 1. Apparently, neither Chief Judge Mishler, nor defendant Butler's counsel in the Eastern District criminal action, nor the United States Attorney for the Eastern District of New York were *then* aware that *two* search warrants had been issued by Judge Clark on June 12, 1979—one for Butler's residence and one for his Rolls Royce. Nonetheless, as the Government points out, both of these warrants were founded upon the identical affidavit—that of Englewood Detective Crowley. Moreover, although I decline the Government's invitation to give collateral estoppel effect to Chief Judge Mishler's decision on the suppression motion, I find his reasoning persuasive.

Appendix A

The Complaint in this matter seeks forfeiture pursuant to either of two statutes. First, 21 U.S.C. §881 provides, in pertinent part, that:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (1) All controlled substances which [29] have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> * * *
>
> (4) *All conveyances, including* aircraft, *vehicles,* or vessels, which are used, or are intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, *possession, or concealment* of property described in paragraph (1) . . . (Emphasis added.)

Second, 49 U.S.C. §§781 and 782 provides, in pertinent parts, that:

> (a) It shall be unlawful . . . (2) to conceal or possess any contraband article in or upon any . . . vehicle . . . ; or (3) to use any . . . vehicle . . . to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
>
> (b) As used in this section, the term "contraband article" means—

Appendix A

(1) Any narcotic drug which has been or is possessed with intent to sell or [30] or offer for sale in violation of any laws or regulations of the United States dealing therewith;

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited.

The jurisprudence concerning these "admittedly harsh but nonetheless valud forfeiture laws", *United States v. One 1975 Mercedes 280S,* 590 F.2d 196, 198 (6th Cir. 1978), is well-settled. The Government bears only the initial burden of showing probable cause for forfeiture of the subject property; once this showing has been made, the burden of coming forward with evidence shifts to the claimant to absolve the vehicle from culpability. *Ibid.*, quoting *United States v. One Twin Engine Beech Airplane,* 533 F.2d 1106, 1107 (9th Cir. 1976); *accord, United States v. One 1976 Lincoln Mark IV,* 462 F. Supp. 1383, 1387 (W.D. Pa. 1979); *see also United States v. One 1950 Buick Sedan,* 231 F.2d 219, 220 (3d Cir. 1956).

Probable cause for forfeiture exists if there is evidence sufficient to warrant a prudent person to believe [31] that the subject vehicle was used in violation of the above*quoted forfeiture statutes. The requisite evidence is "less than prima facie proof but more than mere suspicion", United States v. One 1975 Ford F100 Pickup Truck,* 558 F.2d 755, 756 (5th Cir. 1977). *See generally United States v. One 1950 Buick Sedan, supra,* 231 F.2d at 221.

Appendix A

The facts averred in the affidavits of DEA Special Agent Stromfeld and Englewood Police Lieutenant Marino clearly establish that no genuine issue of material fact exists in this forfeiture action, save for the validity of the June 12th warrant authorizing the search of claimant's Rolls Royce. The white powder found in the automoible was field-tested by Agent Stromfeld and found to contain cocaine. The cocaine was contained in a white envelope which was secreted ("concealed") in a pocket on the seatback of one of the car's front seats. Therefore, if the search warrant for the automobile is valid, such proof of the use of this vehicle to conceal a controlled substance, cocaine, clearly establishes the requisite probable cause for forfeiture. I therefore turn to consider the validity of the automobile search warrant.

The Government contends that two grounds exist upon which this Court could uphold the validity of the automobile warrant: first, that claimant is collaterally estopped from relitigating the search and seizure of the Rolls Royce by reason of Chief Judge Mishler's Memorandum Opinion and Order [32] denying defendant Butler's suppression motion in the Eastern District criminal action; second, that the automobile warrant was in any event founded upon the requisite probable cause to search.

The question of whether claimant is collaterally estopped from litigating the validity of the automobile search is interesting but somewhat troublesome.

> (W)hile under the principle of collateral estoppel the parties, or their privies, are precluded from relitigating relevant and material matters that were adjudged — the adjudication binding the parties as

> to these matters in their litigation of a separate and different cause of action, — the parties are not, as to the different cause of action, precluded from raising and litigating matters that were not adjudged *even though these could have been raised and litigated in the other suit.*

1B *Moore's Federal Practice*, p. 0.410(1) at 1152-53 (footnotes omitted) (emphasis added). Therefore, assuming, *without deciding*, that claimant is not barred from questioning the validity of the June 12th automobile search warrant, I turn to consider the Government's second theory.

I have reviewed the affidavit propounded by Englewood [33] Detective Crowley in support of both of the search warrants; I conclude that this affidavit established the requisite probable cause to search the 1976 Rolls Royce. In reaching this conclusion, I expressly rely upon the well-reasoned Memorandum Opinion and Order of Chief Judge Mishler in *United States v. Leroy Butler, et al.*, No. 78 CR 752 (E.D.N.Y. September 20, 1979), which I attach hereto as an Appendix to this Bench Opinion. In addition, I note that the following portions of the search warrant affidavit when taken together with the remaining allegations, clearly establish probable cause to search the Rolls Royce (as opposed to claimant's residence): Crowley's informant "stated that he personally observed a trap door in the ceiling of Butler's garage where Butler would keep his drug and dilutents (sic)." Search Warrant Affidavit of James Crowley, p. 5. Moreover, the affiant states that Mrs. Butler told other Englewood police officers on April 16, 1979 "that Leroy does not live at the house, just comes there every day to conduct his business." *Id.* at p. 8. I find that these two facts, when taken

together with the other facts related in Detective Crowley's affidavit, suffice to establish the existence of the requisite probable cause to search the claimant's Rolls Royce. Claimant's contention that the affidavit contains no indication that the informant was reliable, see *Spinelli v. United States,* 393 U.S. 410 (1969), is without merit. This affidavit relates [34] other incriminating facts *not* attributed to the informant sufficient to enable the municipal judge to conclude that there was a "substantial basis" for crediting the informant's hearsay. *See United States v. Harris,* 403 U.S. 571, 583 (1971). I therefore embrace Chief Judge Mishler's finding to the same effect, see Appendix at 5-6.

Having found that the warrant for the search of the Rolls Royce was based upon the requisite probable cause, it follows a fortiori that the ensuing search of the Rolls Royce was authorized and lawful. This search revealed that an envelope bearing the claimant's name and address was *concealed* in the pocket on the seatback of the front seat of the car. A field test of the white powder discovered in that envelope in turn established the requisite probable cause for forfeiture of the Rolls Royce for concealment therein of cocaine, a narcotic drug and controlled substance. Finding that the Government has met its burden of establishing probable cause for forfeiture, and that the claimant has not presented any meritorious defenses, I conclude that the Government's motion for summary judgment should be granted and that the claimant's motions for dismissal of the complaint and for summary judgment should be denied in all respects.

The Court desires that the Government submit an Order in conformance with this Opinion within ten (10) days of this day.

Appendix A

[35]APPENDIX

United States v. Leroy Butler, et al., No. *78 CR 752*

(S.D.N.Y. September 20, 1979) (Mishler, C.J.)

(Memorandum of Decision and Order)

Appendix A

[36]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

LEROY BUTLER, et al.,

Defendants.

78 CR 752

Memorandum of Decision and Order

September 20, 1979

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Barry E. Schulman, Esq., *Of Counsel*
Laurence A. Urgenson, Esq., *Of Counsel*

OZRO THADDEUS WELLS, ESQ.
HUBERT JOHNSON, ESQ.
Attorneys for Defendant
350 Broadway - Suite 1200
New York, New York 10013

MISHLER, CH. J.

Appendix A

Defendant, Leroy Butler, moves pursuant to Rule 41(e) of Criminal Procedure, to suppress as evidence all articles seized at his home located at 431 Lewelen Circle, Englewood, New Jersey, and his car, on June 13, 1979, pursuant to a warrant issued by a judge of the Municipal Court of Englewood on June 12, 1979. The motion challenges the sufficiency of the supporting affidavit made by Detective Sergeant James Crowley of the Englewood Police Department.

[37] *The Affidavit*

The affidavit states that "On September 2, 1976, New York City had an informant at Butler's house." The fair inference is that the informant reported the activities he observed to a member of the Organized Crime Control Bureau of the New York City Police Department. The information was passed on to Detective Crowley by Detective Richard McQuire of that unit in their joint investigation of Butler. The informant reported that on September 2, 1976, he was at Butler's house and saw him sell five (5) boxes of mannite, and again on September 7, 1976, when Butler sold five (5) boxes of mannite.[1] According to the affidavit, the informant also reported he saw a trap door in the ceiling of the garage at Butler's house that served as a cache for his drugs and dilutents.[2] The affidavit further sets out that the informant stated that he met with Peter Pollack on October 19, 1976, and that Pollack told him that he had just seen Butler pay one Vincent Beltempo $200,000 for narcotics.

The affidavit also contains the following information:

(1) In the fall of 1976, when Butler came to Crowley's attention as a subject for investigation, he was classified by the

Appendix A

Organized Crime Control Bureau of the New York City Police Department as a large scale heroin and heroin dilutent trafficker in New York and Detroit, Michigan;

(2) In April of 1979, when local police came to 471 [38] Lewelen Circle in response to a complaint arising out of a domestic quarrel, Mrs. Butler told the police officers that Butler did not live at the 471 Lewelen Circle address, but conducted his business from that address and that the police were aware of it.

(3) On May 15, 1979, the Englewood Police started a surveillance of the premises. They noted a television camera facing the street. On that day they also noted that an automobile registered to one Ana V. Thorne who, in June 1978, lived at 4235 S. Kenyon Street, Seattle, Washington. It was an address known to Settle police "because they have made arrests and convictions at that location for distributing heroin and cocaine." p. 9;

(4) Out-of-state cars were observed parked at Butler's house on May 15, 16, 17 and 18. On May 18, Detective Crowley and one Lieutenant Manno spotted a grey Mercedes Benz at Butler's house. When the officers approached to note the registration number, it sped away at a high rate of speed. A grey Mercedes Benz had been registered to Peter Pollack, who listed his address as 471 Lewelen Circle, Englewood.

(5) On May 29, 1979, a 1978 Mercedes Benz, registered to Marlene Hill, who is known to the Drug Enforcement Administration as a trafficker in narcotics, was parked at the Butler house and again on June 6, 1979. Peter Pollack's [39] car was parked at the Butler house on May 31, 1979, and on June 2, 1979.[4]

Appendix A

Discussion

Butler contends that the affidavit is insufficient because it contained no indication that the informant was reliable and thus failed to meet the requirements of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584 (1969). We cannot agree.

It is true that the affidavit did not state that the informant had previously supplied accurate information. However, as the Second Circuit has repeatedly stated,

> "Such a recital . . . is only one way of validating hearsay used to obtain a search warrant—not a ritual that must be invariably observed even when the circumstances render it inappropriate." *United States v. Bozza*, 365 F.2d 206, 225 (2d Cir. 1966). The principle to be applied is that the magistrate must have a "'substantial basis' for crediting the hearsay." *United States v. Harris*, 403 U.S. 573, 581, 91 S. Ct. 2075, 2081 (1971).

United States v. Rollins, 522 F.2d 160, 165 (2d Cir. 1976). Such a "substantial basis" clearly existed here.

It is well-established that the credibility of an informant may be established by independent corroborative evidence. *See United States v. Rollins, supra, United States v. Canestri*, 518 F.2d 269 (2d Cir. 1975). Here, the corroborative evidence was substantial. The Butler residence was frequented by known drug traffickers, *see United States v. Phillips*, 375 F.2d 75 (7th Cir.) *cert. denied*, 389 U.S. 834, 88 S. Ct. 40 (1967), who on at least one occasion fled upon the approach of police; a television camera was positioned in front of the house, clearly permitting

the inference that Butler was wary of potential law enforcement intrusion; Butler's wife stated that Butler ran a "business" that the authorities knew about from his house, but did not actually reside there. All in all, reading the affidavit in a common-sense and realistic fashion, *United States v. Ventresca,* 380 U.S. 102, 108, 85 S. Ct. 741, 746 (1965), and giving appropriate deference to the magistrate's judgment, *see Mapp v. Warden,* 531 F.2d 1167, 1172 (2d Cir. 1976), we cannot say that the warrant should not have been issued.

Butler also claims that the information in the affidavit was stale at the time the application was made. This claim is rejected. The affidavit shows that this was [41] a continuous investigation and that 1976 information was updated by the information obtained from Mrs. Butler on April 16, 1979, and the observations of surveilling law enforcement officers between May 15, 1979, and June 6, 1979, showing Butler's continuous course of business over the period from 1976 to June 6, 1979. *See Mapp v. Warden, supra,* 531 F.2d at 1172.

Conclusion

Defendant Butler's motion to suppress evidence seized pursuant to the warrant is in all respects denied and it is

SO ORDERED.

Jacob Mishler
U. S. D. J.

Appendix A

Footnotes

1. The government's brief concedes that the information was inaccurate, and that on the two occasions referred to mannite was delivered to Butler's home rather than sold. These deliveries were surveilled by members of the New York City Police Department and electronically monitored. (Brief, p.7, n.1). Apparently the informant reported this information accurately in the first instance, but it was transmitted to Crowley incorrectly. We attach no significance to this misstatement as there is no allegation that it was intentionally made. *See Frands v. Delaware,* 438 U.S. 154 (1978).

2. This information, according to the government (Brief, p.8, n.2) was also, *see* note 1 *supra,* not correctly stated by Crowley; the informant apparently spoke only of dilutents.

3. A co-defendant in the indictment who, at the time of affidavit's execution, was a fugitive.

4. We note that the affidavit stated that an indictment naming Butler was to be unsealed on June 13, 1979. p. 13. The inference to be drawn from the affidavit was that the indictment charged Butler with a conspiracy, *see* p. 7, which was drug related. While we do not base our decision on this fact, we think it well to point out that the magistrate was thus advised that a grand jury had found that probable cause existed to charge Butler with the crime.

APPENDIX B — UNREPORTED JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1920

UNITED STATES OF AMERICA

v.

ONE 1976 ROLLS ROYCE SILVER SHADOW, Serial No. LRE 25888

LEROY BUTLER, claimant, Appellant.

Appeal from the United States District Court for the District of New Jersey

(D.C. Civil Action No. 79-3051)

Submitted Under Third Circuit Rule 12(6)
February 23, 1981

Before: WEIS and GARTH, *Circuit Judges* and MILLER.*

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

---

* The Honorable Jack Richard Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

Appendix B

Costs taxed against appellant.

BY THE COURT,

JOSEPH F. WEIS, JR.
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Feb. 25, 1981

APPENDIX C — ORDER EXTENDING TIME TO FILE PETITION

SUPREME COURT OF THE UNITED STATES

No. A-964

ONE 1976 ROLLS ROYCE SILVER SHADOW,

Petitioner

v.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 25, 1981.

s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 25th
day of May, 1981.

JUN 1981
Received
Hubert Johnson

APPENDIX D — INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 78 CR 752
(T. 21, U.S.C. §§841(a)(1) and 846)

UNITED STATES OF AMERICA

-against-

JOEL MERLING, HYMAN LIEBERMAN, PETER ISRAEL POLLACK, CLIFFORD JOSEPH PARAH; LEROY BUTLER; WILLIE EARL PATTERSON; DONALD DEWEES; ANDRE DEWEES; ARTHUR GIBBONS; LEROY PERRY; CHARLES CAMERON; DAVID CHOROST.

Defendants.

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between July, 1974 and December, 1976 both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOEL MERLING, HYMAN LIEBERMAN, PETER ISRAEL POLLACK, CLIFFORD JOSEPH PARAH, LEROY BUTLER, WILLIE EARL PATTERSON, DONALD DEWEES, ANDRE DEWEES, ARTHUR GIBBONS, LEROY PERRY, CHARLES CAMERON, and DAVID CHOROST, together with others known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.

Appendix D

1. It was part of said conspiracy that certain of the defendants and co-conspirators would distribute and other defendants and co-conspirators would receive quantities of mannite and quinine to be mixed with heroin, a Schedule I narcotic drug controlled substance.

2. It was further a part of said conspiracy that various defendants and co-conspirators would knowingly and intentionally distribute quantities of heroin, a Schedule I narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846).

A TRUE BILL

FOREMAN

EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

APPENDIX E — SEARCH WARRANT FOR PREMISES

MUNICIPAL COURT OF THE
CITY OF ENGLEWOOD, N.J.

STATE OF NEW JERSEY
SS:
COUNTY OF BERGEN

TO: Det. Sgt. James Crowley
and/or any other duly sworn
police officer of the State
of New Jersey

Complaint upon oath and in writing having been made before me, Judge of the Englewood Municipal Court, Englewood, N.J. on this day by: Det. Sgt. James Crowley, alleging that he has good reason to believe that in and upon certain premises and/or appurtenant structures located thereon within the City of Englewood, in this County and State, to wit: The home of Leroy Butler, 431 Lewelen Circle, Englewood N.J.

Premises known as:

and more particularly described as: one story ranch home with T.V. cameras, front and side & rear, described on the Englewood tax map as, Lot-24, Block-1701

there has been and is now located certain property, to wit:

CONTROLLED DANGEROUS SUBSTANCES

used in the connection with or in furtherance of the commission of a crime in violation of the laws of the State of New Jersey, to wit: 24:21-19.a1, 24:21-20.a1, 24:21-20.a4, 24:21-35

Appendix E

And the undersigned having examined and considered the application of this warrant does find that probable cause exists for the issuance of the search warrant.

Therefore, you are hereby ordered and commanded to enter by breaking if necessary, in the day or night time and search with the proper assistance the place and person thereinabove named for the property specified, making it known to the person or persons in control thereof, if any, your authority for doing so and to make the search and to seize into your possession all such specified property which may be found on the said premises to the end that the same may be dealt with according to law.

You are further commanded to give a copy of this search warrant to the person in control thereof, if any, or in the absence of such person to leave a copy of this warrant in the place hereinabove named. In the event that you seize any of the property specified you shall give a receipt for the property so seized to the person present, if any, or in the absence of such person leave a receipt in the place where said property is found.

You are further commanded to execute this warrant within ten (10) days from the issuance hereof and forthwith make a return to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand at 11:45 o'clock A.M., this 12 day of June, 1979.

s/ J. Clark
JUDGE, ENGLEWOOD
MUNICIPAL COURT
ENGLEWOOD, NEW JERSEY

APPENDIX F — SEARCH WARRANT FOR VEHICLE

MUNICIPAL COURT OF THE
CITY OF ENGLEWOOD, N.J.

STATE OF NEW JERSEY
SS:
COUNTY OF BERGEN

TO: Det. Sgt. James Crowley
and/or any other duly sworn
police officer of the State
of New Jersey

Complaint upon oath and in writing having been made before me, Judge of the Englewood Municipal Court, Englewood, N.J. on this day by: Det. Sgt. James Crowley, alleging that he has good reason to believe that in and upon certain premises and/or appurtenant structures located thereon within the City of Englewood, in this County and State, to wit: 1976 Rolls Royce, N.J. registration 758-HAS black & brown

Premises known as:

and more particularly described as:

there has been and is now located certain property, to wit:

CONTROLLED DANGEROUS SUBSTANCES

used in the connection with or in furtherance of the commission of a crime in violation of the laws of the State of New Jersey, to wit: 24:21-19.a1, 24:21-20.a1, 24:21-20.a4, 24:21-35

Appendix F

And the undersigned having examined and considered the application of this warrant does find that probable cause exists for the issuance of the search warrant.

Therefore, you are hereby ordered and commanded to enter by breaking if necessary, in the day or night time and search with the proper assistance the place and person thereinabove named for the property specified, making it known to the person or persons in control thereof, if any, your authority for doing so and to make the search and to seize into your possession all such specified property which may be found on the said premises to the end that the same may be dealt with according to law.

You are further commanded to give a copy of this search warrant to the person in control thereof, if any, or in the absence of such person to leave a copy of this warrant in the place hereinabove named. In the event that you seize any of the property specified you shall give a receipt for the property so seized to the person present, if any, or in the absence of such person leave a receipt in the place where said property is found.

You are further commanded to execute this warrant within ten (10) days from the issuance hereof and forthwith make a return to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand at 11:45 o'clock A.M., this 12 day of June, 1979.

s/ J. Clark
JUDGE, ENGLEWOOD
MUNICIPAL COURT
ENGLEWOOD, NEW JERSEY

APPENDIX G — SUPPORTING AFFIDAVITS FOR SEARCH WARRANTS

STATE OF NEW JERSEY

SS:

COUNTY OF BERGEN

I, *Detective Sgt. James Crowley,* being of full age and duly sworn according to law, upon my oath deposes and says:

1. I am a member of the Englewood, N.J. Police Department, assigned to the Detective Division. I have been a member of this department for the past 14½ years, and I have been assigned to my present assignment for the past 11½ years.

2. During these years as a police officer, I have conducted hundreds of investigations into the operations of Controlled Dangerous Substances, which is a crime under the statutes of the State of New Jersey.

3. In the fall of 1976, this affiant, along with Detective Richard McQuire, of the New York City Police Organized Crime Control Bureau, conducted an investigation into several Englewood residents. The purpose of the investigation was the identifying of Narcotic Distributors and their associates who lived in Englewood and did their narcotic business in New York City.

4. One of the subjects of the investigation was, LEROY BUTLER AKA "HIPPIE"
Black Male D.O.B. (6/6/38)
His home is located at, 471—Lewelen Circle, Englewood, N.J.
Leroy Butler has been previously described by New York City

Organized Crime Control Bureau as being a large scale "Heroin and Heroin dilutent trafficker", in New York and in Detroit, Michigan.

5. On September 2, 1976, New York City had an informant at Butler's house. At that time, the informant observed Butler sell 5 boxes of manite, and on September 7, 1976, Butler sold 5 more boxes of manite from the house.

On October 19, 1976, the informant met with one, Peter Pollack, who stated to the informant that he just left Butler's house and observed Butler pay one, Vincent Beltempo $200,000.00 for narcotics. The informant stated that he personally observed a trap door in the ceiling of Butler's garage where Butler would keep his drugs and dilutents.

6. At this time the case was turned over to the D.E.A. in order that they could do a conspiracy investigation into all parties involved in the operation.

7. On May 11, 1979, this affiant was contacted by Louis Rice of the D.E.A. and informed that Butler and others were about to be indicted for conspiracy and arrested in the next couple of weeks and the Englewood Police could now continue their investigation.

8. A check with Patrolman Van Zilen revealed that on April 16, 1979, he responded to the Butler home along with Officer Moore on a domestic complaint. Mrs. Butler told the Officers that she wanted to sign a complaint against Leroy for assault and battery. At this time she also stated to the Officers, "The Police know what Leroy is doing at the house, he pays a lot of people, he conducts his business out of the house every

afternoon". She further stated to the Officers that Leroy does not live at the house, just comes there every day to conduct his business.

9. On May 15, 1979, a surveillance was started at 471 Lewelen Circle. The home is in a residential area and has a T.V. camera facing the street with a monitor inside the house. It is impossible to sit on the house without being detected. You can only drive past.

On this day, Detectives Bendel and Blischak found 3 cars at the house.

1 — 758-HAS-1976 Rolls Royce, Color Brown
Owner: NJ Leroy Butler
471 Lewelen Circle, Englewood, N.J.

2 — 172-IXN-1977 Honda, Color Blue
Owner: NJ Ana V. Thorne
930 Grand Concourse, Bronx, N.Y.
Serial Number SBC5051525

3 — UHC-226-1978 Buick, White
Owner: N.J. Marie A. Vlachos
200 Winston Drive, Cliffside Park, N.J.

A check with the file revealed that on June 23, 1978, a car spotted at the Butler house with Seattle, Washington Plate, ACD-3D came back to Ana V. Thorpe, 4236 S. Kenyon Street, Seattle, Washington, Serial Number of Car, SBC 5051525. This is same serial number as car now registered to 930 Grand Concourse, Bronx, N.Y.

On May 15, 1979, this affiant called Seattle, Washington Police, Narcotic Bureau to ask for a record check on Ana V.

Appendix G

Thorpe. Seattle Police informed this affiant that there was no arrest record for Thorpe, however, the address of 4236 South Kenyon Street is known to them because they have made arrests and convictions at that location for distributing heroin and cocaine.

10. On May 16 and 17, 1979, vehicles were observed at the house, from Carolina, New York and New Jersey with no record. On May 18, 1979, Lieutenant Marino and this affiant were parked at the bottom of Lewelen Circle when a gray Mercedes Benz passed the Officers and the driver spotted the Officers. The car turned into Butler's driveway. The Officers started up Lewelen Circle to obtain the plate number. At this time the car backed out of Butler's driveway and took off at a high rate of speed. The Officers could not catch the car.

A check of the file revealed that the only gray Mercedes Benz that had been at Butler's house belonged to Peter I. Pollack. 1974—Mercedes Benz, Color Gray, Registration—678CAXNJ
Car registered to, 471 Lewelen Circle, Englewood, N.J.

Pollack is now a fugitive from an indictment for narcotics violation in New York City and has just been indicted by a Federal Grand Jury for Narcotic violations.

11. Due to the particular incident this affiant felt it necessary to stay away from the Butler house in order not to arouse suspicion as to the surveillance, and wait to here from the D.E.A. as to when they were going to arrest Butler.

12. A spot check at the house revealed the following: That on May 29, 1979, Registration #327-KIT was at the house, a 1978 Mercedes Benz, owned by, Marlene Hill, 165 N. Carolina

St., Atlantic City, N.J. A check with the D.E.A. revealed that Marlene Hill is known to them as being involved in Narcotics. On May 31, 1979, Peter Pollack's car was at the house. On June 2, 1979, Pollack's car was at the house and on June 6, 1979, Marlene Hill's car was at the house.

13. On June 6, 1979, this affiant received a call from Agent Louis Rice of the D.E.A. stating that the sealed indictment against Butler would be unsealed on June 13, 1979 and they would arrest Butler when he arrives at the house in the afternoon of June 13, 1979.

14. It is the intent of this affiant after Butler is arrested to search his home at 431 Lewelen Circle for Controlled Dangerous Substances.

15. D E S C R I P T I O N S
Premises of — 431 Lewelen Circle
Englewood, New Jersey

One Story Ranch Home
(With T.V. cameras, front and side & rear)

Described on the Englewood Tax Map as,
L O T—24 B L O C K—1701

Vehicle — N.J. Registration 758-HAS
1976 ROLLS ROYCE
Color—Black & Brown

WHEREFORE, I respectfully request that a search warrant be issued authorizing a search of the person(s) and premises as described hereinabove, and seizure of the described property if found, in the manner provided by law.

Appendix G

s/ James Crowley

Sworn and subscribed to before
me this 12 day of June, 1979.

s/ J. Clark
Judge, Englewood Municipal Court
Englewood, New Jersey

Det. Sgt. J.J. Crowley:om